

05-681 NOV 23 2005
No. 05-__

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In The
Supreme Court of the United States

DAVID G. STERN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the First Circuit, after remand from this Court, failed to address the constitutional challenge raised by the Petitioner in his Petition for Writ of Certiorari that the Judgment of Conviction entered in the instant case must be vacated and a Judgment of acquittal entered where all of the elements of the offense were not charged in the indictment, presented to the jury and proven at trial beyond a reasonable doubt?

Whether the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. ____ (2005) mandated a constitutional sentence less than what was imposed under the facts of the instant case?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

David G. Stern petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit requesting review of the Judgment entered by that Court on June 29, 2005.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the First Circuit entered on February 19, 2004, is unpublished and is reproduced at App. 1-4. The Order of the Court of Appeals for the First Circuit entered on April 24, 2004, denying Stern's Petition for Rehearing and En Banc Determination is unpublished and is reproduced at App. 5-6. The Order of the Court of Appeals for the First Circuit entered on August 16, 2004, denying Stern's Motion to Recall Mandate is unpublished and is reproduced at App. 8-9. The Order of the First Circuit entered on May 11, 2005, directing the parties to submit supplemental briefs subsequent to the vacating of the Judgment of February 19, 2004 by this Court in light of *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005) is unpublished and is reproduced at App. 11-12. The Judgment affirming Stern's conviction and sentence entered by the First Circuit on June 29, 2005, is unpublished and is reproduced at App. 13.

STATEMENT OF JURISDICTION

The Judgment of Conviction was entered by the District Court on October 1, 2002. Petitioner timely filed his Notice of Appeal on October 4, 2002. The First Circuit

Court of Appeals summarily affirmed the Conviction and sentence in a Judgment entered on February 19, 2004. App. 1-4. Petitioner timely filed his Motion for Rehearing and En Banc determination. The Court of Appeals for the First Circuit issued its Order denying the Motion for Rehearing and En Banc Determination on April 22, 2004. App. 5-6. Thereafter, Petitioner applied for and on July 7, 2004, received from the Hon. David Souter, Associate Justice an extension of time "to and including September 19, 2004" within which to file his Petition for Writ of Certiorari. App. 7.

Petitioner filed his Petition for Writ of Certiorari on September 16, 2005. On January 24, 2005, this Court granted the petition for Writ of Certiorari and vacated the Judgment and remanded the case to the First Circuit Court of Appeals "for further consideration in light of *United States v. Booker*, 543 U.S. ____ (2005)." App. 13.

On May 11, 2005, the First Circuit in light of this Court's Judgment of January 24, 2005 invited the parties to submit supplemental briefs, to discuss how the alleged *Booker* error was preserved. App. 11-12.

Subsequent to the filing of supplemental Briefs, without oral argument and hearing the First Circuit without disposing of the issues raised by the Petitioner, and failing to follow their circuit precedent in *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) summarily affirmed Stern's conviction. App. 11.

On August 17, 2005, Petitioner applied to the Hon. David Souter, Associate Justice for a 60-day extension of time to file a Petition for Writ of Certiorari. On August 24, 2005, Justice Souter granted that extension to November 26, 2005. App. 14.

This Court has jurisdiction under 28 U.S.C. § 254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . Nor shall any person . . . be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation . . ."

STATEMENT OF THE CASE

Petitioner David G. Stern was charged in an Indictment in the United States District Court for the District of Massachusetts on July 18, 2001, with 16 counts of mail fraud in violation of 18 U.S.C. § 1341 and 2 counts of wire fraud in violation of 18 U.S.C. § 1343. App. 15-21.

A jury trial was held on April 1-4, 2002 before the Hon. Nancy Gertner, United States District Judge for the District of Massachusetts. Over Petitioner's objections, in which he relied upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court refused to include on the jury

verdict form the amount of the alleged loss.¹ App. 22-25. Stern was found guilty of counts 1-14, 16, 17, and 18, but acquitted of count 15.

On September 25, 2002, Petitioner was sentenced by the district court to a term of imprisonment of 30 months, plus 3 years of supervised release. In calculating Stern's sentence, the district court *enhanced* the base offense level under U.S.S.G. § 2F1.1(a) of 6 points, by 13 points; 2 points under Sec. 2F1.1(b)(2)(A) for more than minimal planning; 2 points under Sec. 2B1.3 for fiduciary relationship; and 9 points under Sec. 2F1.1(b)(1)(J) for a loss of \$450,000.

None of the enhancements, which resulted in a 13 level increase in the Guideline Sentencing Table, were charged in the indictment, presented to the jury, or found by the jury beyond a reasonable doubt. The resulting enhancements increased Stern's sentence from a range of 0-6 months (level 6) to 30-37 months (level 19), plus the corresponding increase in his term of supervised release.

The Judgment of Conviction was entered on October 1, 2002. Petitioner filed a timely Notice of Appeal in the First Circuit Court of Appeals on October 4, 2002. On January 6, 2003, Stern self-surrendered to the Federal Medical Center Camp Devens in Ayer, Massachusetts, where he remained incarcerated until on or about January 4, 2005.

¹ The Petitioner repaid any alleged loss amounts at issue, plus interest some 2½ years prior to the commencement of the criminal proceedings.